No. 82-1508.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

AMERICAN DENTAL ASSOCIATION, AND
DR. JOSEPH P. CAPUCCIO,
PETITIONERS,

v.

DONALD R. MYERS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief of Respondent, Donald R. Myers, in Opposition.

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Questions Presented.

1. Whether petitioner has correctly characterized this case as one in which burden of proof as to venue is an actual issue and one in which plaintiff has failed to show a substantial nexus between one of the defendants and the forum territory.

2. Whether petitioner has correctly characterized this case as one in which one of the defendants neither does business in nor has substantial contracts with the forum territory.

3. Whether petitioner has correctly characterized this case as one in which an individual defendant who was personally served with process in the forum territory had no continuing contracts with that territory.

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Cases.

STATUTES.

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Parties to the Proceeding.

American Dental Association, herein called ADA, and Dr. Joseph P. Capuccio, herein called Dr. Capuccio, were defendants in the district court, were appellants in the Court of Appeals, and are petitioners herein.

Donald R. Myers, herein called Dr. Myers, was plaintiff in the district court, was appellee in the Court of Appeals, and is respondent herein.

As to ADA's Rule 28.1 statement, it should be noted that ADA had, upon information and belief, a large number of constituent societies. Virgin Islands Dental Association, herein called VIDA, is such a constituent society. While not a party to these proceedings before the Supreme Court, VIDA was a party defendant in the district court.

Statement of the Case.

The statement of the case which follows paraphrases portions of the opinion of the court entered in this proceeding by the United States Court of Appeals for the Third Circuit. (The appendix forming part of petitioners' petition for a writ of certiorari, herein called A., 8a, 9a, 15a, 33a, 34a.)

ADA is a professional association of dentists. (The appendix filed by petitioners, as appellants, in the Court of Appeals, herein called Cir. A., 47.)

VIDA, located in the Virgin Islands, is a constituent society of the ADA (Cir. A. 31).

Under ADA's by-laws, member of VIDA must also be dues-paying members of ADA (Cir. A. 54). By virtue of the relationship between ADA and VIDA, VIDA was required to adopt the Principles of Ethics and Code of Professional Conduct, herein called the Code, promulgated by ADA (Cir. A. 31, 32, 52, 54). By virtue of the same relationship, VIDA was prohibited from adopting any local rules inconsistent with the Code (Cir. A. 31).

Dr. Myers is a dentist licensed in the Virgin Islands, Puerto Rico, and Massachusetts (Cir. A. 5, 31). He objects to the following provision of the Code:

> A dentist who chooses to announce specialization . . . shall limit the practice exclusively to the announced special area(s) of dental practice . . . .

(Cir. A. 31.)

Dr. Myers asserts that practitioners in areas with small populations cannot develop an adequate practice if limited solely to their area of specialization (Cir. A. 50-51). Dr. Myers seeks to hold himself out both as a general dentist and as an oral surgeon (Cir. A. 48).

The business of ADA is to adopt and enforce codes of conduct (Cir. A. 47). The Code is a code of conduct recently promulgated by ADA. *Id.* The Code affects the Virgin Islands. (Cir. A. 48-52.) Indeed, Dr. Myers in the Virgin Islands is a direct target of the Code. *Id.*

ADA acted to bring about acceptance of and compliance with the Code in the Virgin Islands. Certain officers of the ADA came to the Virgin Islands to attend the annual meeting of VIDA to ensure that VIDA adopted the very Code which underlies this proceeding (Cir. A. 32, 51-52, 54).

Dr. Capuccio had for some eight years been an ADA trustee for the Virgin Islands and Puerto Rico (Cir. A. 51). As such, he had regularly attended and participated in VIDA's annual meetings in the Virgin Islands for eight consecutive years. *Id.* He had done so to ensure that VIDA took no action inconsistent with ADA policy and to endeavor to carry out ADA policy with VIDA. *Id.* Then, Dr. Capuccio again came to the Virgin Islands to attend another annual meeting of VIDA, this time to urge adoption by VIDA of the very Code which underlies this proceeding (Cir. A. 32).

When ADA officers (including Dr. Capuccio) came to the Virgin Islands to attend the VIDA annual meeting and to bring about VIDA acceptance and compliance with the Code, the U.S. Marshal served such officers (including Dr. Capuccio) with process in this proceeding (Cir. A. 32, 51, 52, 54).

There is no dispute as to the foregoing facts. These facts were advanced by Dr. Myers and were not controverted by ADA or Dr. Capuccio.

Summary of Argument.

I. The majority of the Court of Appeals stated that the party objecting to venue has the burden of proof as to venue. Petitioner association, which objected to venue, urges that such a ruling is wrong. Whether the rule is right or wrong, all the operative facts in this case were established by respondent, the proponent of venue, and not controverted by petitioner association. Thus, the majority's statements as to burden of proof constituted mere dicta (pp. 5-7).

II. The majority of the Court of Appeals cited uncontroverted record facts as to defendant association's business in and substantial contacts with the forum territory. On the basis of those facts, the majority's holding that venue lay was well within established guidelines (p. 8).

III. The individual petitioner was served in the forum territory. He was there in direct connection with the underlying dispute. He had been there many times before in direct connection with the underlying dispute. Accordingly, the majority's holding that there was personal jurisdiction over the individual petitioner was well within established guidelines (pp. 8-9).

Argument.

I. THE HOLDING OF THE THIRD CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF THE SUPREME COURT OR OTHER CIRCUIT COURTS REGARDING THE BURDEN OF PROOF IN OBJECTIONS TO VENUE.

A. *Absence of Conflict with the Supreme Court's Decisions.*

In *Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), the court reversed because venue did not lie under § 27 of the Securities Exchange Act of 1934 (48 Stat. 902, as amended, 15 U.S.C. § 78aa) or the general federal venue statute (28 U.S.C. § 1391(b)). In the instant proceeding, the Court of Appeals did not hold that venue lay under either of those statutes. Thus, the *holding* herein does not conflict with the *Leroy* case.

B. *Absence of Conflict with Other Circuits and Absence of Departure from Well Established Rule with Respect to Venue Objections.*

The Court of Appeals based its venue decision herein on undisputed facts stated in uncontroverted affidavits, especially the affidavits of Drs. Myers and Fairchild. Both the majority and the dissent found in Drs. Myers' and Fairchild's affidavits the uncontroverted facts that, for the majority, resolved the venue issue in favor of Dr. Myers (A. 8a, 9a, 15a, 33a, 34a, 55a, 56a). On the basis of the undisputed facts, especially those advanced in the affidavits of Drs. Myers and Fairchild, the majority held:

> We therefore hold that ADA's direct, continual supervision in the Virgin Islands of VIDA to ensure enforcement

> of ADA's professional Code made it reasonable to subject ADA to plaintiff's choice of venue in the District of the Virgin Islands . . . .

(A. 34a.)

It follows from the foregoing that the discussion of burden of proof by the majority played no role in the holding and was mere dictum.

Improper venue is an affirmative defense. ADA raised that defense, citing both 28 U.S.C. § 1391(b) and 15 U.S.C § 22. Let us assume for the sake of argument that, ADA having raised the defense, Dr. Myers had the burden of proof as to the venue issue. Dr. Myers filed his two affidavits and the affidavit of Dr. Fairchild (Cir. A. 31-33, 48-52, 54). On the basis of the uncontroverted facts in those affidavits, the district court held that venue lay under 28 U.S.C. § 1391(b). (Dr. Myers still considers that decision correct.) On the basis of the same uncontroverted facts, the Court of Appeals majority held that venue lay under 15 U.S.C. § 22. (Dr. Myers does not dispute that decision.) In each case, the decision is based on uncontroverted facts advanced below by Dr. Myers. It follows that the burden of proof issue is illusory. If Dr. Myers had the burden of proof, he carried it.

The burden of proof language of the Court of Appeals served no purpose other than to provide unnecessary support for the proposition, as to which petitioners do not complain, that, "we [the Court of Appeals] are not precluded from affirming the order of the district court if it has reached the right result, although for the wrong reason . . . ." (A. 22a-23a.)

The burden of proof language slipped into the Court of Appeals' opinion for two reasons. First, applying a narrow "transacting business" theory, the dissent noted that Dr. Myers did not respond to ADA's affidavits (A. 51a). While Dr.

Myers did respond to ADA's affidavits, a more direct answer is that Dr. Myers' affidavits were the decisive ones, and ADA did not respond to them. Thus, there was no issue as to burden of proof.

Second, the Court of Appeals majority unnecessarily took up the burden of proof question to buttress a proposition that needed no buttressing. A paraphrase of the majority's position would be: (1) We can affirm if the District Court result is right for the wrong reason; (2) moreover, ADA had the burden of proof (A. 22a-23a). But "(1)" alone was sufficient. (See the authorities cited at n.14 at A. 23a.) The burden of proof language was makeweight, and no cause for Supreme Court intervention.

The foregoing is not to be construed as disagreement with the majority's well-reasoned dicta as to burden of proof.

Seemingly inconsistent cases confuse venue and jurisdiction. Further, seemingly inconsistent cases involve uncontroverted facts. As example is *Bartholomew* v. *Virginia Chiropractors Ass'n, Inc.*, 612 F.2d 812 (4th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980). In that case, the facts were uncontroverted, but the court gratuitously alluded to the burden of proof, and gratuitously ran the burden-of-proof rule as to jurisdiction and the burden-of-proof rule as to venue into each other (612 F.2d at 816): "Notwithstanding that the burden is upon plaintiff to establish venue *and* jurisdiction, . . ., the quoted response *was not traversed* . . . ." (Emphasis added.)

It follows from the foregoing that the instant proceeding involves, at worst, a conflict of dicta. This case is not an appropriate vehicle for a Supreme Court pronouncement on burden of proof in venue cases.

II. THE HOLDING OF THE COURT OF APPEALS ON WHAT CONSTITUTES "TRANSACTING BUSINESS" FOR A NON-PROFIT CORPORATION DOES NOT CONFLICT WITH A DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS, THE TWO CASES BEING ENTIRELY CONSISTENT WITH ONE ANOTHER.

In *Bartholomew* v. *Virginia Chiropractors Ass'n, Inc.*, *supra*, the court rejected venue over ACA, a chiropractic association, stating (612 F.2d at 816): "All transactions were by mail . . . ."It [ACA] had not crossed *into* Virginia *in perfecting its purposes* . . . ." (Emphasis added.)

In the instant case, the Court of Appeals upheld venue over ADA, stating (A. 34a): "We therefore hold that ADA's direct, continual supervision *in* the Virgin Islands of VIDA *to ensure enforcement of ADA's professional Code* made it reasonable to subject ADA to plaintiff's federal antitrust claim . . . ." (Emphasis added.)

In each case, the question was whether the professional association had acted *in* the jurisdiction to perfect the association's purposes. Except by way of the media, ACA had not acted *in* Virginia. In contrast, ADA's officers had "crossed into" the Virgin Islands "in perfecting its [ADA's] purposes." The two cases represent the same principle, but different facts.

There is no conflict.

III. THE THIRD CIRCUIT'S HOLDING THAT PERSONAL JURISDICTION MAY BE BASED ON PERSONAL SERVICE OVER DR. CAPUCCIO, WHO HAD CONTINUING FORUM CONTACTS, CONSTITUTES NO VIOLATION OF CONSTITUTIONAL DUE PROCESS.

The Court of Appeals alluded to Dr. Capuccio's eight-year history of participation in VIDA affairs in the Virgin Islands. The court alluded to Dr. Capuccio's ADA policy purposes in the Virgin Islands. The court stated (A. 15a):

> Dr. Capuccio's presence in the Virgin Islands at the time of service of process was not a mere fortuity . . . . Having purposefully entered the district to advance the interests of the ADA in the Virgin Islands, Dr. Capuccio rendered himself subject to the jurisdiction of the Virgin Islands' courts at least with respect to disputes related to his presence there. The instant litigation is one such lawsuit. We therefore hold that the district court may assert personal jurisdiction over Dr. Capuccio, who, properly served, had intentionally entered within its territory for the purpose of engaging in an activity upon which the lawsuit is predicated.

Such a limited holding is entirely uncontroversial.

Conclusion.

It is respectfully submitted that this Honorable Court should deny the petitioners' petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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